

Matter of: Charles R. Cox
File: B-252773
Date: December 16, 1993

DIGEST

An employee failed to use 140 hours of restored annual leave within the 2-year period permitted by the Office of Personnel Management regulation at 5 C.F.R. § 630.306 (1993), thus resulting in its forfeiture a second time. The agency's failure to plan and schedule the employee's leave to avoid forfeiture, as required by the agency's nondiscretionary policy, constituted administrative error. The error may be corrected by substituting the restored leave for annual leave the employee took during the period. The resulting forfeited annual leave may be restored under 5 U.S.C. § 6304(d)(1)(A) (1988). Robert D. McFarren, 56 Comp. Gen. 1014 (1977).

DECISION

Mr. Charles R. Cox, an employee of the Federal Aviation Administration (FAA), requests restoration of 140 hours of restored annual leave.¹ Mr. Cox had not used the restored annual leave at the expiration of the 2-year period prescribed by the Office of Personnel Management (OPM),² causing it to be deducted from his account.

Mr. Cox had 140 hours of annual leave restored as the result of an exigency of the public business ending in 1989. 5 U.S.C. § 6304(d)(1)(B) (1988). By the end of the 1991 leave year, Mr. Cox had not used the restored annual leave and it was forfeited a second time. Mr. Cox states that he thought that he had until 1998 to use these 140 hours of restored annual leave since he has until then to use other restored leave that he had accumulated following the Professional Air Traffic Controllers Organization strike. Mr. Cox

¹The request was submitted by the Assistant Administrator for Human Resource Management, Federal Aviation Administration.

²5 C.F.R. § 630.306 (1993).

was unaware of the existence of a different time frame by which the restored leave from the exigency, which ended in 1989, had to be used.

The FAA states that it is aware of two decisions of this Office which denied an employee's request for further restoration of annual leave beyond 2 years in which the employees alleged that their employing agency had given them erroneous advice regarding the rules for using their restored leave.³

The FAA points out that, unlike the agencies involved in those decisions, it has a nondiscretionary agency policy that requires management to take deliberate steps to insure that the annual leave of employees is not lost. The policy vests management with final responsibility for the planning and scheduling of the annual leave of employees for use throughout the leave year and applies to both unrestored and restored annual leave. Thus, the FAA believes that its failure to plan and schedule Mr. Cox's leave and to counsel him as to a potential loss of leave provides a basis for restoring his annual leave for a second time.

We agree. Section 6304(d)(2), title 5, United States Code, provides that restored annual leave in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management (OPM). An OPM regulation provides in 5 C.F.R. § 630.306 (1993) that leave restored under the provisions of 5 U.S.C. § 6304(d) must be used within 2 years. As a general rule, this 2-year requirement may not be waived or modified. Edmund Godfrey, 62 Comp. Gen. 253 (1983); Dr. James A. Majeski, *supra*, footnote 3; Patrick J. Quinlan, B-188993, Dec. 12, 1977.

However, in Robert D. McFarren, 56 Comp. Gen. 1014 (1977), we allowed the substitution of restored leave for annual leave to prevent its forfeiture due to administrative error. There, the employee had requested that his absence be charged to restored leave, but the agency erred and charged the leave instead to the employee's regular annual leave account, with the result that the restored leave was forfeited. We held that the employee's leave account should be corrected by substituting restored leave for annual

³Dr. James A. Majeski, B-247196, Apr. 13, 1992; William Corcoran, B-213380, Aug. 20, 1984.

⁴FAA Personnel and Pay Policy § 3600.4g (change 17, Aug. 18, 1980).

leave, and that the annual leave that was then forfeited was subject to restoration.⁵

Here, the administrative error was not of a clerical nature but was due to the agency's failure to follow its own nondiscretionary policy. Its failure to do so caused the employee to forfeit his restored leave.

Accordingly, in order to correct its error in not scheduling Mr. Cox's restored leave to avoid its loss, the agency should substitute restored leave for the regular annual leave that it charged to Mr. Cox's leave account. Mr. Cox would then have forfeited regular annual leave for leave year 1991 which, under the provisions of section 6304(d)(1)(A), would be subject to restoration because of administrative error.

James F. Hinchman
General Counsel

⁵The exigencies of public business exception in 5 U.S.C. § 6304(d)(1)(B) was cited as authority since the employee had requested and been denied annual leave that year due to the exigencies of public business.